IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MICHAEL A. HYDE, **Plaintiff,** **v.** **PROVO CITY, LEWIS BILLINGS, ROBERT STOCKWELL AND JOHN DOES I-X,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 2:03CV-0120 DAK**

This matter is before the court on (1) Defendants' Motion for Summary Judgment and (2) Plaintiff's Motion to Amend the Complaint. A hearing on Defendants' Motion for Summary Judgment was noticed for April 29, 2004 at 3:00 PM. At the hearing, Blake Nakamura of Nakamura & Nykamp appeared on behalf of the plaintiff. Defendants did not appear at the hearing through counsel or otherwise. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. INTRODUCTION

The plaintiff, Michael Hyde, has brought three causes of action against defendants related

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to his resignation from employment with Provo City: (1) Deprivation of property interest in violation of 42 U.S.C. § 1983 (against Provo City, Lewis Billings, and Robert Stockwell); (2) Fraud inducing the plaintiff to resign and sign a release (against Lewis Billings and Robert Stockwell); and (3) Intentional Infliction of Emotional Distress (against Lewis Billings and Robert Stockwell). Defendants have moved for summary judgment on all claims. Plaintiff has filed a motion seeking leave to amend his complaint in order to add Eric Mauser as a defendant and to allege that, under the doctrine of respondeat superior, Mayor Lewis Billings is vicariously liable for the alleged fraud of Robert Stockwell and Eric Mauser.

I. MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate if the record before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When, as in this case, the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden by pointing to a 'lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Sports Unlimited, Inc. v. Lankford Enter., Inc.*, 275 F.3d 996, 999 (10th Cir. 2002) (quoting *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). The court will "view the evidence and draw any inferences therefrom in the light most favorable to the party opposing summary judgment." *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d

1437, 1440 (10th Cir. 1996). Where state law requires proof by clear and convincing evidence at trial, the court will review the summary judgment motion in light of that evidentiary standard. *North Texas Production Credit Assoc. v. McCurtain County National Bank*, 222 F.3d 800, 813 (10th Cir. 2000).

B. Background

The Plaintiff was hired by Provo City in May of 1997 to be the Assistant Community Development Director. Provo City's personnel documents show that the plaintiff was hired as a "full-time regular probationary" employee and later successfully completed his probationary period and was granted a salary increase upon becoming a regular employee. Being placed on a probationary period is indicative of being a non at-will employee. At-will employees do not go through a probationary period and then move on to become a "regular employee." Rather, at-will employees serve solely at the pleasure of the Mayor. The Provo City Policies and Procedures Manual lists certain positions that are "at-will" and therefore have no grievance rights. The plaintiff's position, Assistant Community Development Director, is not listed as an at-will position. Moreover, state laws that have been in effect since 1977 indicate that plaintiff's position is a non at-will position. Despite all the above, plaintiff was always told by his superiors and the personnel management at Provo City–and it was always the plaintiff's understanding while employed by Provo City–that he was an at-will employee.

In March of 1999, Mayor Billings decided to terminate the plaintiff's employment. The primary reason for the termination appears to be a dispute between the Mayor and the plaintiff over issues surrounding the preservation and/or redevelopment of the St. Francis Catholic Church in

Provo City. On March 29, 1999, Mr. Stockwell, the City's Chief Administrative Officer, notified the plaintiff that the City had decided to terminate his employment. Mr. Stockwell drafted a resignation letter for the plaintiff's signature that provided the plaintiff with a three month postponement of termination and three months of severance after termination in exchange for the plaintiff agreeing not file any form of litigation related to his resignation against Provo City and to refrain from discussing the circumstances surrounding his resignation with others. The plaintiff was informed by Mr. Stockwell that if he did not sign the resignation letter by 3:00 P.M. that day he would be fired and receive no benefits. Mr. Stockwell further informed the plaintiff that plaintiff was an at-will employee and therefore had no recourse to challenge his termination and that consulting with an attorney would be a waste of money because as an at-will employee he had no right to challenge his termination.

The plaintiff signed the resignation letter. In accordance with the resignation letter's terms, plaintiff continued to work for Provo City for three more months and then received three months in severance after his termination. After his termination, the plaintiff obtained a job in Washington. The plaintiff eventually learned he was not an at-will employee because of a Provo City Council meeting where the confusion surrounding the at-will status of assistant department heads was discussed and later reported in the *Provo Daily Herald*. It is now undisputed that the plaintiff was not an at-will employee during the time he was employed by Provo City and that the representations made by Mr. Stockwell to the plaintiff regarding his grievance rights and employment status were false. Defendants claim they were mistaken as to the plaintiff's employment status and honestly believed at the time of his resignation that he was an at-will employee. The plaintiff has brought this

lawsuit seeking to invalidate the release he signed in the resignation letter and seeking damages. To date, the plaintiff has not tendered back the severance payments he received as part of the letter agreement.

C. Fraud

If the release set forth in the resignation letter signed by the plaintiff is enforceable, all of plaintiff's claims are barred. However, "[i]f a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." *Peterson v. Coca-Cola USA*, 48 P.3d 941, 946 (Utah 2002).

> To establish fraud under Utah law, a party must prove by clear and convincing evidence each of the following elements:
> (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 207-08 (Utah 2001) (citations omitted).

It is undisputed that a false representation was made by Mr. Stockwell concerning a presently existing material fact (i.e. plaintiff was told that he was an at-will employee with no grievance rights when in fact he was not an at-will employee). There is also evidence to support a finding that the representations made by Mr. Stockwell were for the purpose of inducing the plaintiff to sign the resignation letter and that the plaintiff reasonably relied upon the representation to his injury. The

only question is whether the plaintiff has enough evidence to prove that Mr. Stockwell's representation was something "the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation."

Defendants rely upon their own deposition testimony to argue that they honestly believed that plaintiff was an at-will employee at the time of his resignation. Mr. Stockwell admits that his representation was wrong but denies that he knew it was false at the time he made it or that he was reckless in making such a representation. Plaintiff relies upon the policy manual, personnel records, and state statutes that all indicate plaintiff was not an at-will employee to argue there are factual disputes as to whether Mr. Stockwell knew his statements were false or recklessly made the statements knowing he had insufficient knowledge upon which to make such a representation. The court believes that viewing the evidence and drawing all inferences in a light most favorable to the plaintiff, a jury could conclude that Mr. Stockwell recklessly misrepresented to the plaintiff that he was an at-will employee while knowing he had insufficient knowledge upon which to make such a representation. The same cannot be said of the claim for fraud against Mayor Billings. It appears to be undisputed that Mayor Billings never made any representations to the plaintiff regarding whether he was, or was not, an at-will employee. Therefore, the claim for fraud against Mayor Billings fails as a matter of law.

1. ***Misstatements of Law***

Defendants assert that Mr. Stockwell's representation to the plaintiff that he was an at-will employee cannot, as a matter of law, be a basis for an action for fraud because it is an opinion as to a matter of law. It is true that "statements of opinions as to the legal effect of contracts are not

generally a proper basis for a claim of fraud." *Berkeley Bank for Cooperatives v. Meibos*, 607 P.2d 798, 805 (Utah 1980). In support of their argument, defendants quote WILLISTON ON CONTRACTS (4th ed.) § 69:10 and *Gadd v. Olson*, 685 P.2d 1041 (Utah 1984) for the general rule that a claim of fraud cannot be supported by misstatements as to matters of law. However, immediately after stating the general rule, both WILLISTON ON CONTRACTS and *Gadd* then note that there are several exceptions to the general rule. WILLISTON identifies four exceptions to the general rule:

> [1] where there is a relationship of trust and confidence between the parties;
> [2] where one party is possessed or claims to be possessed of superior knowledge of the law and takes advantage of the other party's ignorance of the law to mislead him or her;
> [3] where the misrepresentation in question relates to the law of foreign jurisdiction; and
> [4] where the misrepresentation includes and express or implied misrepresentation of fact.

WILLISTON § 69:10. The court in *Gadd* identifies similar exceptions and notes that the general rule is inapplicable where the person making the representation possesses "superior means of information, or willfully misled him into a misconception of his rights and liabilities." *Gadd*, 685 P.2d at 1044 (citations omitted).

In discussing the fourth exception listed above, WILLISTON notes: "[a] federal district court considering a fraud case against an employer who had represented to employees that they were in fact independent contractors reached a similar conclusion, noting that such a representation is clearly one of law, but that under Oregon law whether it is actionable turns on whether it is purely a statement of opinion or instead is a representation as to legal matters which of necessity implicates facts, which may state a viable fraud claim." § 69:10; *see Travis v. Knappenberger*, 204 F.R.D. 652

(D. Or. 2001) (applying Oregon law). Mr. Stockwell's misrepresentation regarding the plaintiff's at-will status includes an express or implied misrepresentation of fact and certainly led the plaintiff "into a misconception of his rights and liabilities" and therefore can properly form the basis for a fraud claim.

2. *Election of Remedies*

Defendants rely upon *Perry v. Woodall*, 438 P.2d 813 (Utah 1968) to argue that plaintiff has waited too long to rescind the severance agreement. "One who claims he has been deceived and elects to rescind his contract by reason of fraud or misrepresentation of the other contracting party must act promptly and unequivocally in announcing his intention . . . . The law is well settled that one electing to rescind a contract must tender back to the other contracting party whatever property of value he has received." *Id.* at 401. The Court in *Perry* held that the plaintiff had "waited too long, and that he cannot now rescind the contract." *Id.* This doctrine is often referred to as election of remedies.

In discussing *Perry*, the Utah Supreme Court has noted the distinction between rescission at law and rescission in equity:

> Rescission at law is accomplished without the aid of a court. It is completed when, having grounds for justifying rescission, one party to a contract notifies the other party that he intends to rescind the contract and returns that which he received under the contract. *See Perry v. Woodall*, 438 P.2d 813, 815 (1968). *See also Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979). The rescinding party may then go into court to obtain assistance in recovering his property or value from the other party. *Id.* On the other hand, actions brought asking a court to rescind a contract are actions in equity. *See* D. Dobbs *Handbook on the Law of Remedies* § 4.8, at 293 (1973).

Acton v. Deliran, 737 P.2d 996, 999 n. 5 (Utah 1987). Perhaps more relevant to the instant case, the Utah Supreme Court has observed that "[t]he plaintiff in an action for fraud has the option to elect to rescind the transaction and recover the purchase price or to affirm the transaction and recover damages. The choice of remedy belongs to the victim of fraud, and a choice cannot be forced upon him." *Dugan v. Jones*, 615 P.2d 1239, 1247 (Utah 1980). The court further explained:

> [A]ny delay on the part of the defrauded party, especially his remaining in possession of property received by him under the contract, and, dealing with it as his own, may constitute a waiver of the right to rescind the contract. However, the right to recover damages for the fraud upon the affirmance of the contract is not so easily lost, for the defrauded party, who does not discover the fraud until he has partly performed, may go forward with the contract, keep what he has received, and still maintain his action for damages.

Id. The plaintiff in the instant action is not seeking reinstatement of his employment with Provo City. Rather, the plaintiff seeks only damages for the alleged fraud and therefore his claim is not barred by the doctrine of election of remedies.[1]

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[1] Federal courts have discussed state law doctrines requiring a party to tender back the severance benefits received before challenging the validity of a release in the context of Age Discrimination in Employment Act ("ADEA") claims. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221 (10th Cir. 1999). The courts recognized the state law doctrines requiring an election of remedies but found those common law doctrines to be abrogated by the ADEA and Older Workers Benefit Protection Act (OWBPA). *Bennett*, 189 F.3d at 1233 ("In the context of ADEA claims, however, federal law has abrogated this common law doctrine [election of remedies] through Congress' policy decision requiring heightened protection for older workers, implemented in the OWBPA."). Obviously, the ADEA and OWBPA are not at issue in this lawsuit and the court is not aware of any other statutes that would pre-empt Utah common law in this case. However, the public policy concerns mentioned in the ADEA cases, although not the basis for this court's decision, seem relevant: "a discharged employee likely will have spent the moneys received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the moneys and relying on ratification." *Oubre*, 522 U.S. at 427. Likewise, a doctrine that allows employers to commit § 1983 violations and then use an employee's failure to repay the severance compensation as a way of avoiding liability might encourage more § 1983 violations.

D. Intentional Infliction of Emotional Distress

Defendants argue that plaintiff's claim for intentional infliction of emotional distress is barred by Utah's Governmental Immunity Act. However, as defendants acknowledge, a governmental employee acting in a representative capacity can be sued individually if "the employee acted or failed to act due to fraud or malice." Utah Code Ann. § 63-30-4(4)(a); *see also DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995) ("even though the governmental agency cannot be liable, an employee who commits fraud in the course of his employment can be held personally liable."). Accordingly, the claim for intentional infliction of emotional distress against Mr Stockwell cannot be dismissed at this time because the plaintiff alleges, and a jury could find, that Mr. Stockwell acted with fraud. Because the court has found there is no evidence of fraud on the part of Mayor Billings, the claim for intentional infliction of emotional distress against Mayor Billings is barred by Utah's Governmental Immunity Act.

II. SECOND AMENDED COMPLAINT

Plaintiff seeks to amend his complaint to add Eric Mauser as a defendant and to allege that Mayor Lewis Billings is vicariously liable for the alleged fraud of Robert Stockwell and Eric Mauser.

A. Vicarious Liability of Mayor Billings

Apparently realizing that there is no evidence to support an action for fraud directly against Mayor Billings, plaintiff seeks to amend his complaint to allege "that when Mr. Stockwell committed the fraud against Mr. Hyde he did so at the direction and in the scope of his employment with Mr. Billings" and therefore Mayor Billings is personally liable for Mr. Stockwell and/or Mr. Mauser's fraud. (Mem. in Supp. of Mot. to Amend Compl. at 3-4.) In support of this argument, plaintiff cites Utah case law standing for the proposition that an employer/principal can be held

vicariously liable for the fraudulent acts of its employee/agents. However, it is undisputed that at the time of the alleged fraud, Mr. Stockwell and Mr. Mauser were employed by Provo City–not by the mayor in his individual capacity.[2] (Compl. ¶ 6; Proposed Amen. Compl. ¶ 6.) Mayor Billings is therefore not vicariously liable for the acts of Robert Stockwell and Eric Mauser under the doctrine of respondeat superior.

The plaintiff also cites *Wardley Better Homes and Gardens v. Cannon*, 61 P.3d 1009 (Utah 2002) to argue that Mr. Stockwell and Mr. Mauser's knowledge should be imputed to Mayor Billings. (*See* Mem. in Reply in Supp. of Mot. to Amend Compl. at 6.) "Whether a principal is vicariously liable for an agent's acts and whether a principal is imputed with his agent's knowledge are separate legal questions." *Wardley Better Homes and Gardens*, 61 P.3d at 1015. Even if Mr. Stockwell and Mr. Mausder's knowledge could be imputed to Mayor Billings, there is still no evidence to support a claim for fraud against Mayor Billings because there is no evidence that Mayor Billings ever made any representations to the plaintiff regarding his employment status. In other words, even if the court were to impute knowledge to Mayor Billings that the plaintiff was not an at-will employee, there is no evidence before the court that Mayor Billings ever made a misrepresentation concerning that fact to the plaintiff. Accordingly, granting plaintiff leave to amend his complaint to add a cause of action for vicarious liability against Mayor Billings would be futile.

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[2] Plaintiff acknowledges that under Utah's Governmental Immunity Act, Provo City cannot be held liable for the alleged fraud of its employees. Accordingly, plaintiff has not attempted to allege a cause of action for vicarious liability for fraud against Provo City, but instead, seeks to hold Mayor Billings individually liable for the alleged fraud of Mr. Stockwell and Mr. Mauser.

B. Eric Mauser

Mr. Mauser was the Director of Human Resources for Provo City during the time period the plaintiff was hired and resigned. Mr. Mauser incorrectly informed the plaintiff at the time he was hired that he was an at-will employee. At the time the plaintiff was asked to resign, Mr. Stockwell consulted with Mr. Mauser regarding the plaintiff's employment status and had Mr. Mauser review and approve the resignation letter drafted by Mr. Stockwell for the plaintiff's signature. *See Schwartz v. Tanner*, 576 P.2d 873, 875 (Utah 1978) (holding that a person who did not make the actual misrepresentation can still be held liable for the fraud if they actively participated). Mr. Mauser's department issued the personnel documents indicating that the plaintiff started as a probationary employee and later became a full-time regular employee. Mr. Mauser and his department were also the persons primarily responsible for administering the Provo City Policies and Procedures Manual. For the same reasons discussed above regarding the fraud claim asserted against Mr. Stockwell, the court finds there are disputed issues as to material facts with respect to the proposed claims against Mr. Mauser. Therefore, the court cannot say, as a matter of law, that amending the complaint to add Mr. Mauser as a party would be futile. Accordingly, plaintiff's request for leave to amend his complaint to add Eric Mauser as a party is granted.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that: (1) Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part, the causes of action against Lewis Billings for fraud (second claim for relief) and intentional infliction of emotional distress (third claim for relief) are dismissed with prejudice, the remainder of Defendants' Motion for Summary Judgment is denied; (2) Plaintiff's Motion to Amend the Complaint is GRANTED in

part and DENIED in part, plaintiff may amend his complaint to add Eric Mauser as a party but may not amend the complaint to assert a claim for vicarious liability against Lewis Billings.

DATED this 17th day of May, 2004.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

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United States District Court
for the
District of Utah
May 19, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00120

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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